

WHEN INSPIRATION BECOMES INFRINGEMENT

The Protection of Copyrights in the Arts

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Copyright Law Basics

§ 102 Subject Matter

- literary works;
- musical works/sound recordings;
- dramatic works;
- pictorial works;
- choreographic works;
- audiovisual works; and
- architectural works.

§ 106 Exclusive Rights

- reproduction;
- distribution;
- public performance (but not a sound recording);
- public display;
- adaptation (derivative work);
- digital performance of a sound recording.

§ 201 Originality and Fixation

Copyright law protects:

1. original works;
2. fixed in a tangible medium of expression.

Originality Requirement

- 1) Independent creation;
- 2) Modest quantum of creativity—*de minimis* standard

Bleistein case: Courts should not make aesthetic decision (simple circus poster held copyrightable).

Vargas case: One-bar drum pattern may be sufficiently original—issue of fact for jury.

Who Owns a Copyright?

- The author owns the copyright if there is no employment or work for hire agreement.
- Employers own works created by employees in scope of employment.
- Joint ownership requires contribution of copyrightable work by each co-author and **intent** to create a joint work.

Duration

- Works created on January 1, 1978 or later endure for the author's life plus 70 years.
- Works made for hire or anonymous or pseudonymous works: 95 years from publication or 120 years from creation, whichever is shorter.

Notice & Registration

Publication, registration and notice are not required for copyright ownership to vest.

Form of notice: ©[date of first publication] [name of copyright owner].

©2002, Sony Entertainment.

Infringement

Elements of an infringement claim:

1. **ownership** of valid copyright;
2. **copying** which constitutes improper appropriation (essentially, must prove substantial similarity to original portions of protected work).

Infringement

In the absence of direct proof of copying, plaintiff may prove:

(a) access; and

(b) substantial similarity.

Reverse proportionality rule: *The more similar, the less circumstantial evidence of access is needed. 7th Cir. does not allow inference of access from striking similarity, as in some other circuits.*

Substantial Similarity

- Plaintiff must prove that defendant's copying created a substantially similar work.
- May freely copy the *ideas* embodied in a work but cannot copy the author's original expression.
- Substantial similarity requires that defendant has copied more than a de minimis amount of plaintiff's protected expression.

Substantial Similarity Tests

- **Extrinsic Test:**

Analysis of elements such as: sequence of events; characters, relationships, dialogue, mood and style, setting, theme, plot (in dramatic context) are important. Relies heavily on expert testimony.

- **Intrinsic Test:**

Ordinary observer test—subjective reactions of lay observers are important. Expert testimony, detailed analysis and dissection are not used.

Substantial Similarity

A defendant can produce a substantially similar work in the following two ways:

1. Verbatim copying*; and/or
2. Taking the overall pattern and arrangement of the work.

These methods are not mutually exclusive.

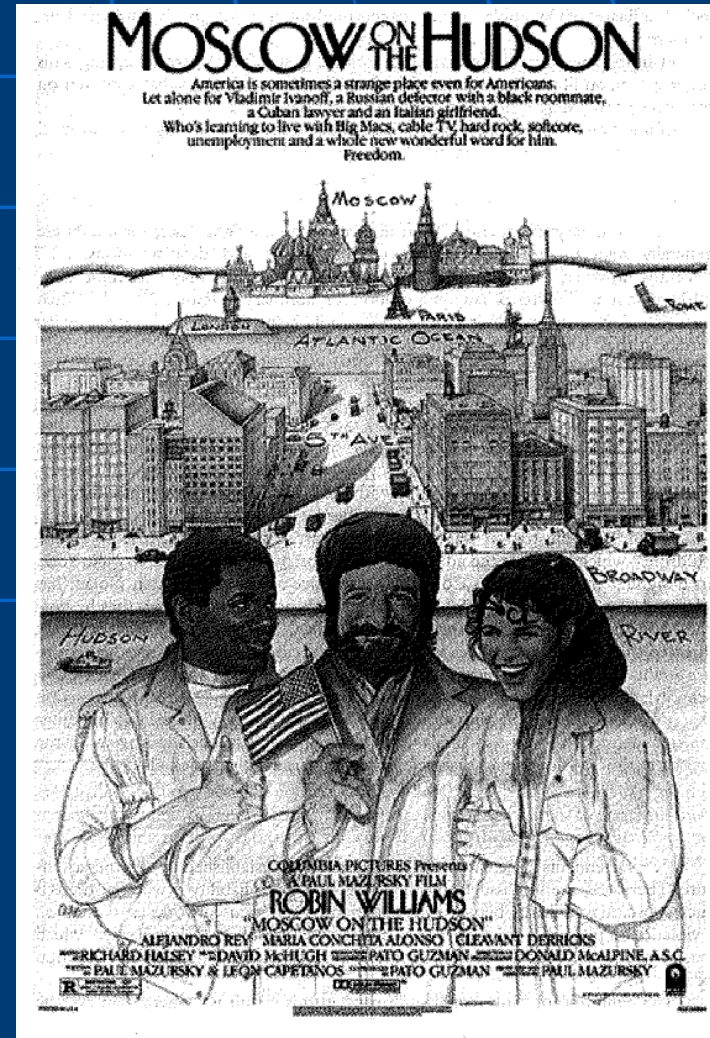
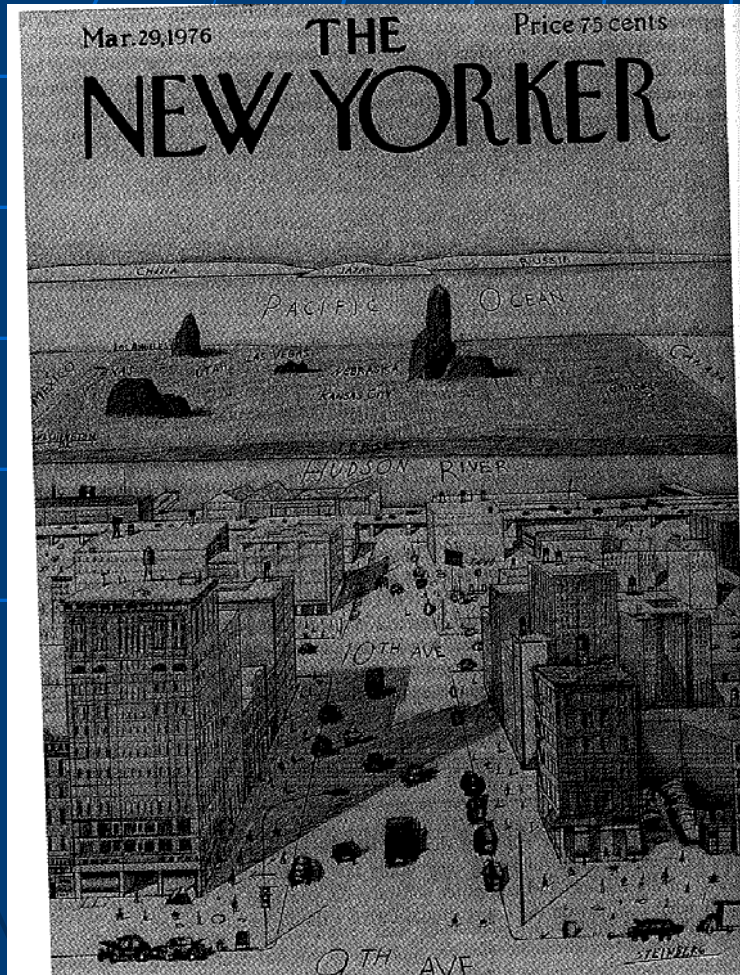
* Fragmented literal similarity.

Dramatic Work Example

Nichols v. Universal Pictures (2d Cir. 1930)

- *Cohens & Kelleys* play held not to infringe *Abbie's Irish Rose* with similar star-crossed lovers/ethnic plot.
- Analysis of plot, themes, characters, dialogue, scenery, etc.
- Judge L. Hand creates famous “abstractions test”: Upon any work...a great number of patterns of increasing generality will fit equally well, as more incidents are left out. . . There is a point in the series of abstractions where they are no longer protected. . . Otherwise ideas would be protected.
- This is essentially the concept of “*scenes à faire*.”

Visual Art Example



Visual Art Example

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)

- Access not disputed.
- “Striking stylistic relationship” between the works in the unique rendering of the cityscapes.
- Analysis of visual perspectives, elements, and overall style lead to a holding of infringement.
- Defendant copied more than unprotected ideas or scenes.

Musical Composition Example

Bright Tunes v. Harrisongs (S.D.N.Y. 1976)

- Access undeniable.
- Analysis of notes (relational, key not very important), rhythm, lyrics.
- Harrison held to infringe Chiffons' "He's So Fine."

Defenses

- **Fair Use:** Affirmative defense under Sect. 107 of Copyright Act, considers purpose, nature, amount and market effect of new work.
- **Statute of Limitations:** Statutory 3-year civil, 5-year criminal.
- **Laches, Acquiescence, Abandonment, Misuse**

Remedies

- Preliminary injunction;
- Permanent injunction;
- Impounding and destruction of infringing articles; or
- Damages and/or profits.

Damages and Profits

According to Section 504, a copyright infringer is liable for either:

- (a) The copyright owner's actual damages (e.g., reasonable royalties) and any additional profits of the infringer (that are not duplicative of damages); or
- (b) Statutory damages (if registered).

Actual Damages and Profits

Double counting prohibited:

Although the 1976 Act allows recovery of *both* damages and profits, plaintiff can only recover profits that are not taken into account when computing actual damages.

Actual Damages and Recovery of Profits

- Because actual damages are difficult to prove, most plaintiffs concentrate on recovering defendant's profits.
- Defendant then has the burden of proving deductible expenses and elements of profit due to factors other than the infringed work.
- Defendant may deduct costs related to the infringing activity (e.g., manufacturing costs, marketing costs and a portion of overhead).

Statutory Damages

- Plaintiff may elect statutory damages—allows P to recover damages without proof of P's loss or defendant's gain.
- Amount within court's discretion between \$750-\$30K per work infringed. For willful infringement, damages can go up to \$150K per work infringed depending on the degree of willfulness. If the infringement was innocent, damages can be reduced to \$200 per work infringed.

Registration

Advantages of Registration

- Establishes public record of claim of copyright.
- Secures right to file infringement suit.
- Establishes prima facie validity of copyright.
- Makes available broader range of remedies, allowing recovery of statutory damages. attorney fees and costs.

Registration Forms

Forms: (not relevant with online registration)

- TX for literary works (and computer programs).
- PA for musical works, dramatic works, motion pictures.
- SR for sound recordings (can also be used to simultaneously register underlying musical work(s) if same author).
- VA for visual works of art.
- SE for serials and periodicals.

Online Copyright Registration

- Benefits:
 - Less expensive than paper filing.
\$35-\$55 online
 - Faster approval process.
(Less than 2 months online v. 1 year or more by mail)
 - Computer-guided application process reduces human error.
 - Pending applications are available online for status updates.

Online Copyright Registration

- To Begin:
 - First, go to www.copyright.gov and choose the link for the “electronic copyright office”




Online Copyright Registration

- Create an account and login.
- The first page will offer several options. Choose “Register a New Claim”



Online Copyright Registration

- You will be given your choice of registration forms. Today we'll file an "SR" form for a sound recording registration.




Types of Work

[Next >>](#) [Save For Later](#)

These are the types of work available in claim registration. Click on a Type of Work listed below for more information about each type.

- [Literary Work](#)
- [Work of the Visual Arts](#)
- [Sound Recording](#)
- [Work of the Performing Arts \(includes music, lyrics, screenplays, etc.\)](#)
- [Motion Picture / Audio Visual Work](#)
- [Mask Work](#)
- [Single Serial Issue](#)
- [Works that include more than one type of authorship.](#)
- [Click here](#) for information on what may be included on a single application.

Select "Type of Work" that you are registering.

* **Type of Work:** 

Online Copyright Registration

- Enter the album title under “Title of work being registered.”
- Enter the individual song titles under “Contents title.”

Title

[Help](#) [Save](#) [Cancel](#)

Give only one Title and Title Type at a time on this screen; then click "Save".

Step 1: Click on ["Title Type"](#) to determine the type of title.

Step 2: Select the Title Type. You must select ["Title of Work Being Registered"](#) at least once.

Step 3: Enter the title from the work that corresponds to the Title Type you selected.

Step 4: When you have finished adding all titles, Click "Save" to save the title.

* **Title Type:**

* **Title of this work:**

Title

[Help](#) [Save](#) [Cancel](#)

Give only one Title and Title Type at a time on this screen; then click "Save".

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Step 4: When you have finished adding all titles, Click "Save" to save the title.

* **Title Type:**

* **Title of this work:**

Online Copyright Registration

- Follow the prompts to enter application information regarding authorship, work-for-hire, & description of authors' contributions.
- Enter the claimants' names and addresses.

Claimants					
					1 - 3 of 3
Name	Organization Name	DBA	Transfer Statement	Address	Edit Delete
Daniel Reed				c/o Meitus Gelbert Rose LLP, 47 S. Meridian St., Ste. 400, Indianapolis, IN, 46204, United States	 
Robert Meitus				47 S. Meridian Street, Suite 400, Indianapolis, IN, 46204, United States	 
Keith Skooglund				c/o Meitus Gelbert Rose LLP, 47 S. Meridian St., Ste. 400, Indianapolis, IN, 462047, United States	 

Online Copyright Registration

- Provide your own name under “Correspondent” and “Mail Certificate” headings.

Case #: 1-143187371 Type of Case: Sound Recording Date Opened: 12/16/2008 12:50:58 PM

Correspondent

<< Back Next >> Add Me Save For Later

This is the person the Copyright Office will contact if it has questions about this application.
Completion of the name, email address and correspondence address is mandatory.

Individual:	Organization:
* First Name: Jordan	Organization Name:
Middle Name:	
* Last Name: Olivetti	
* Email: jolivetti@mgrfirm.com	* Address 1: 47 S. Meridian St., Ste. 400
Phone: (317) 464-5307	Address 2:
Alternate Phone:	* City: Indianapolis
Fax:	State: IN
	Postal Code: 46204
	Country: United States

Form Pay Submit Work

Type of Work
Titles
Publication / Completion
Authors
Claimants
Limitation of Claim
Rights & Permissions
Correspondent
Mail Certificate
Special Handling
Certification
Review Submission

Online Copyright Registration

- Finally, review your completed application, click “add to cart”, pay the online filing fee, and submit a deposit copy of the work.
- Deposit copies may be submitted in a wide variety of file formats. See www.copyright.gov/eco/help-file-types.html for a complete listing.

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